

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY M. SOLOMON and DEPARTMENT OF THE TREASURY,
BUREAU OF PRINTING & ENGRAVING, Washington, DC

*Docket No. 01-1400; Submitted on the Record;
Issued January 25, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

On June 28, 1995 appellant, then a 50-year-old foreman, filed an occupational disease claim, alleging that factors of employment caused carpometacarpal arthritis of the right thumb. By letter dated September 18, 1995, the Office informed appellant of the type of evidence needed to establish her claim. Appellant retired on November 1, 1995. By decision dated November 8, 1995, the Office denied the claim, finding that appellant failed to establish fact of injury.

On April 13, 1999 appellant filed an occupational disease claim, alleging that employment factors caused bilateral carpal tunnel syndrome and submitted medical evidence. By letter dated July 21, 1999, the Office informed appellant that it had requested her case record from the Federal Records Center. By letter dated November 17, 1999, appellant enunciated the employment factors that she considered contributed to her carpal tunnel syndrome. On December 1, 2000 she wrote her Congressional representative, stating that she had "filed for a reconsideration" on April 13, 1999 and submitted medical evidence. By decision dated March 29, 2001, the Office accepted that appellant filed for reconsideration on April 13, 1999 and denied the request on the grounds that it had not been filed within one year of the November 8, 1995 decision and did not show clear evidence of error. The instant appeal follows.

The only decision before the Board is the Office's March 29, 2001 decision denying appellant's request for reconsideration of the November 8, 1995 decision. Because more than one year had elapsed between the issuance of this decision and April 26, 2001, the date appellant

filed her appeal with the Board, the Board lacks jurisdiction to review the November 8, 1995 Office decision.¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.² The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.³ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴

The Board finds that as more than one year had elapsed from the date of issuance of the Office's November 8, 1995 decision and appellant's request for reconsideration dated April 13, 1999, her request for reconsideration was untimely. The Board notes, however, that the occupational disease claim filed by appellant on April 13, 1999 is for a new condition, carpal tunnel syndrome, and her original claim was for a right thumb condition. The Office should, therefore, undertake development of this claim.

Regarding appellant's request for reconsideration of the November 8, 1995 decision, the Board finds that the evidence submitted by appellant in support of this request is insufficient to establish clear evidence of error.⁵ In a treatment note dated September 27, 1995, Dr. Craig Faulks, a Board-certified orthopedic surgeon, diagnosed possible carpal tunnel syndrome of the right wrist. An electromyography/nerve conduction study done on May 15, 1996 demonstrated very mild left carpal tunnel syndrome and mild left ulnar neuropathy, site unclear, with no electrophysiological evidence of right carpal tunnel syndrome. In a treatment note dated July 24, 1996, Dr. Uma Prasad, a Board-certified internist, diagnosed persistent right carpometacarpal joint arthritis. In an operative report dated July 30, 1998, Dr. William Vetter, a Board-certified orthopedic surgeon, described the surgical procedures of exploration of ulnar nerve, right elbow and medial epicondylectomy, right elbow. Postoperative diagnosis was ulnar neuropathy at the right elbow or cubital tunnel syndrome. In a report dated October 22, 1999, Dr. Vetter noted that appellant had undergone carpal tunnel release and resection arthroplasty of the basilar joint of her thumb on the left with good result. Regarding the work relationship, Dr. Vetter noted that appellant had worked at the employing establishment for 30 years and was then retired. He described work tasks that involved a great deal of keyboarding, sorting through bills, picking up stacks of bills and paper, and doing other multiple grasp-requiring activities and noted that he elicited no history of other "dexterity requiring tasks." Dr. Vetter concluded that, with a reasonable degree of medical certainty, appellant's carpal tunnel syndrome and basilar arthritis of the thumb were related to the repetitive gripping activities and keyboard use that were part of her usual employment activity.

¹ See 20 C.F.R. § 10.501.3(d)(2).

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.607(b) (1999); see *Gladys Mercado*, 52 ECAB ____ (Docket No. 00-898, issued February 12, 2001).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ The Board notes that in the memorandum incorporated into the March 29, 2001 decision, the Office cited federal regulations that were no longer in effect. The Board deems this error harmless, however, as the proper regulation found at 20 C.F.R. § 10.607(b) contains substantially equivalent language.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.⁶

In this case, while appellant submitted a July 24, 1996 treatment note in which Dr. Prasad diagnosed right carpometacarpal joint arthritis and in his October 11, 1999 report, Dr. Vetter advised that appellant's basilar arthritis of the thumb was employment related, the Board finds that these reports are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant or to raise a substantial question as to the correctness of the November 8, 1995 decision of the Office. Therefore, as appellant did not, by the submission of factual and medical evidence, raise a substantial question as to the correctness of the Office's November 8, 1995 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her claim.

The decision of the Office of Workers' Compensation Programs dated March 29, 2001 is hereby affirmed.

Dated, Washington, DC
January 25, 2002

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ Nancy Marcano, 50 ECAB 110 (1998).